CHAPTER VI

The Fugitive Slave in Upper Canada

Before the Act of 1793, there was some immigration of slaves fleeing from their masters in the United States. After the Act of 1793, however, a slave by entering Upper Canada became free, whether he was brought in by his master or fled from him. Legislation of the United States in the same year[1] increased the number of those fleeing to the province under this law. Slaves who had effected their escape to what were considered free States were liable to be reclaimed by their masters. Shocking instances of the forcing into renewed slavery of the escaped slave and even of enslaving the free persons of color are on record and there are told worse which never saw the open light of day.

[1] The first Fugitive Slave Law was passed by the United States in 1793. Three years afterwards occurred an episode, little known and less commented upon, showing very clearly the views of George Washington on the subject of fugitive slaves, at least of those slaves who were his own.

A slave girl of his escaped and made her way to Portsmouth, N. H.; Washington on discovering her place of refuge, wrote concerning her to Joseph Whipple the Collector at Portsmouth, November 28, 1796. The letter is still extant. It is of three full pages and was sold in London in 1877 for ten guineas. (*Magazine of American History*, Vol. 1, December, 1877, p. 759.) Charles Sumner had it in his hands when he made the speech reported in Charles Sumner's *Works*, Vol. 111, p. 177. Washington in the letter described the fugitive and particularly expressed the desire of "her mistress" Mrs. Washington for her return to Alexandria. He feared public opinion in New Hampshire for he added.

"I do not mean by this request that such violent measure should be used as would excite a mob or riot which might be the case if she has adherents; or even uneasy sensations in the minds of well disposed citizens. Rather than either of these should happen, I would forego her services altogether and the example also which is of infinite more importance."

In other words if the slave girl has no friends or "adherents" send her back to slavery—if she has and they would actively oppose her return, let her go—and even if it only be that "well-disposed citizens" disapprove of her capture and return let her remain free.

Eli Whitney's invention of the cotton gin about the same time[2] made slaves much more valuable and not only checked the movement toward gradual emancipation but increased the ardor with which the fugitive was pursued. From 1793 the influx of fugitive slaves into the province never quite ceased. The War of 1812 saw former slaves in the Canadian militia fighting against their former masters and Canada as an asylum of freedom became known in the South by mysterious but effective means. "As early as 1815 negroes were reported crossing the Western Reserve to Canada in great numbers and one group of Underground Railway workers in Southern Ohio is stated to have passed on more than 1000 fugitives before 1817."[3]

It is not proposed here to give an account of the celebrated Underground Railway. It is sufficient to say that it was the cause of hundreds of slaves reaching the province.[4] Some slaves escaped by their own efforts in what can fairly be called a miraculous way. No more dramatic or thrilling tales were ever told than could be told by some of these refugees. Some having been brought by their masters near to the Canadian boundary then clandestinely or by force effected a passage. Some came from far to the South, guided by the North Star. Many were assisted by friends more or less secretly. These refugees joined

[2] Whitney's first patent was 1784. His rights were firmly established in 1807.

[3] Landon, *Canada's Part in Freeing the Slave,* Ontario Historical Society, Papers, etc. (1919), quoting Birney's *James G. Birney and His Times,* p. 435. Mr. Landon's paper is of great interest and value and I gladly avail myself of the permission to use it.

[4] A fairly good account of the Underground Railroad will be found in William Still's *Underground Railroad,* Philadelphia, 1872, in W. H. Mitchell's *Underground Railway,* London, 1860; in W. H. Siebert's *Underground Railway,* New York, 1899, and in a number of other works on Slavery. Considerable space is given the subject in most works on Slavery.

One branch of it ran from a point on the Ohio River, through Ohio and Michigan to Detroit; but there were many divagations, many termini, many stations; Oberlin was one of these. See Dr. A. M. Ross, *Memoirs of a Reformer,* Toronto, 1893, and *Mich. Hist. Coll.,* XVII, p. 248.

settlements with other people of color freeborn or freed in the western part of the Peninsula, in the counties of Essex and Kent and elsewhere.[5] Some of them settled in other parts of the province, either together or more usually sporadically. Toronto received many. These were superior to most of their race, for none but those with more than ordinary qualities could reach Canada.[6]

The masters of runaway slaves did not always remain quiet when their slaves reached this province. Sometimes they followed them in an attempt to take them back. There are said to have been a few instances of actual kidnapping. There were some of attempted kidnapping. Most of these are merely traditional but at least one is well authenticated.[7]

In May, 1830, a young man with finely chiselled features, bright hazel eyes, apparently a quadroon or octoroon applied for service at the house of Charles Baby, "the old Baby mansion in the . . . historical town of Sandwich" in Upper Canada on the Detroit River. He said he had escaped from slavery in Kentucky, had arrived on the previous evening at Detroit and had crossed the river to Canada as quickly as possible. He had been a mason but understood gardening and attending to horses and had other accomplishments. He was engaged and proved a

[5] The Buxton Mission in the County of Kent is well known. The Wilberforce Colony in the County of Middlesex was founded by free Negroes but they had in mind to furnish homes for future refugees. See Mr. Fred Landon's account of this settlement in the recent (1918) *Transactions of the London and Middlesex Hist. Soc.*, pp. 30–44. For an earlier account see A. Steward's *Twenty Years a Slave* (Rochester, N. Y., 1857).

[6] "The Kingdom of Heaven suffereth violence and the violent take it by force." There can be no doubt that the Southern Negro looked upon Canada as a paradise. I have heard a colored clergyman of high standing say that of his own personal knowledge dying slaves in the South not infrequently expressed a hope to meet their friends in Canada.

[7] *Souvenirs of the Past,* by William Lewis Baby, Windsor, Ontario, 1896. Mr. Baby is a member of an old French-Canadian family of the highest repute for honor and public service. Charles Baby was the author's brother. The author lived with him and tells the story of his own knowledge. The quotations are from Mr. Baby's book.

satisfactory servant "respectful, cleanly, capable, lithe and active as a panther." His former master came from Kentucky and reclaimed him after the lapse of six months. The recognition was mutual and immediate. The Kentuckian, offered $2000 to Baby for the return of Andrew his former slave, but the offer was indignantly refused. It turned out that Andrew had taken his master's favorite horse to assist him in his flight but had turned it loose after riding it some twenty-five miles. Whether for this reason or for some other, the Kentuckian did not appeal for the extradition of Andrew[8] but determined to use violence.

A short time afterwards five desperadoes from Detroit attempted to kidnap Andrew while the family were at Church, but they were successfully resisted by Andrew and Charles Baby until the service was over and the people were seen hastening home. The would-be kidnappers made their escape across the river. Finding it dangerous to keep Andrew so near the border, the neighbors took up a subscription and he was sent by stage to York (Toronto). This place he reached in safety. "He made good" and lived a respectable and useful life undisturbed by any fear of Kentucky vengeance.[9]

The law as to such attempts was authoritatively stated in 1819 by John Beverley Robinson, Attorney General of Upper Canada, afterwards Sir John Beverley Robinson, Bart, Chief Justice of Upper Canada. The opinion will be given in his own words:[10]

"In obedience to Your Excellency's comments I have perused the accompanying letter from G. C. Antrobus Esquire, His Majesty's charge d' affaires at the Court of Washington and have attentively considered the question referred to me by Your Excellency thereupon—namely—"Whether the owners of several Negro Slaves who have fled from the United States of America and are now resident in this Province can be permitted to come hither and

[8] As was done in the case of Solomon Mosely, spoken of infra, p.

[9] I have not been able to verify other tales of attempted abduction to my satisfaction, there are, however, several stories which may be true.

[10] *Canadian Archives Sundries, U. C.*, 1819.

obtain possession of their property, and whether restitution of such Negroes can be made by the interposition of the government of this Province" and I beg to express most respectfully my opinion to your Excellency that the Legislature of this Province having adopted the Law of England as the rule of decision in all questions relative to property and civil rights, and freedom of the person being the most important civil right protected by those laws, it follows that whatever may have been the condition of these Negroes in the Country to which they formerly belonged, here they are free—For the enjoyment of all civil rights consequent to a mere residence in the country and among them the right to personal freedom as acknowledged and protected by the Laws of England in cases similar to that under consideration, must notwithstanding any legislative enactment that may be thought to affect it, with which I am acquainted, be extended to these Negroes as well as to all others under His Majesty's Government in this Province. The consequence is that should any attempt be made by any person to infringe upon this right in the persons of these Negroes, they would most probably call for, and could compel the interference of those to whom the administration of our Laws is committed and I submit with the greatest deference to Your Excellency that it would not be in the power of the Executive Government in any manner to restrain or direct the Courts or Judges in the exercise of their duty upon such an application."[11]

Then came a number of applications for the return of runaway slaves cloaked under criminal charges, the pretence being made that they had committed some crime and that it was desired to bring them to trial and punishment. There can be no doubt that in the absence of some constitutional provision every country has the right to keep out criminals and, if they have entered the country, to hand them over to the authorities of the country whence they came; but the rules of international law have never gone so far as to make it obligatory on any country to send away immigrant criminals even if demanded by their former country. It has always been the theory in Upper Canada that the Governor had the power independently of statute

[11] John Beverley Robinson was the son of Christopher Robinson mentioned above.

or treaty to deliver up alien refugees charged with crimes.[12] This was not wholly satisfactory and the legislature took the matter up and passed an act governing such cases, February 13th, 1833,[13] providing for the apprehension of fugitive offenders from foreign countries, and delivering them up to justice. This provides that on the requisition of the executive of any foreign country the governor of the province on the advice of his executive council may deliver up any person in the province charged with "Murder, Forgery, Larceny or other crime which if committed within the province would have been punishable with death, corporal punishment, the pillory, whipping or confinement at hard labour." The person charged might be arrested and detained for inquiry, but the act was permissive only and the delivery up was at the discretion of the Governor-in-Council.

It was under this act that the extradition of Thornton Blackburn was sought but finally refused. The case was this: Two persons of color named Blackburn, a man and his wife, were claimed as slaves on behalf of some person in the State of Kentucky. They were arrested in Detroit in 1833 and examined before a magistrate, who, in accordance with the law of the United States, made his certificate and directed them to be delivered over as the personal property of the claimant in Kentucky. The sheriff took them into custody but when one of them was on the point

[12] The same rule obtained in Lower Canada; (1827) re Joseph Fisher, 1 Stuart's L. C. Rep. 245.

[13] This is the Act (1833), 3 Will IV, c. 7 (U. C.). This statute came forward as cap. 96 in the *Consolidated Statutes of Upper Canada*, 1859, but was repealed by an Act of (United) Canada (1860), 23 Vic. c. 91 (Can.).

The Act of 1833 was drawn by Chief Justice Robinson and introduced by him into the Legislative Council of which he was Speaker—it was a "Government measure." Notice of bringing in the bill was given November 28, 1832; the bill brought in November 30; read the second time December 3 passed the committee of the whole on the fourth of December and was finally passed by the Council the following day. It reached the Legislative Assembly the same day where it was passed without opposition and received the Royal Assent February 13, 1833.

of being removed from the prison to be restored to his owner, he was violently rescued and directed across the river into Canada. On the day before the rescue of Thornton Blackburn his wife eluded the jailer in disguise and escaped to Canada.

The Upper Canadian Government was, therefore, called upon to return these prisoners to the United States. Upon examining the record in the case, however, the Attorney General of Upper Canada in reply to the Governor for information in the case, advised that the so-called offences of Thornton Blackburn in trying to effect his own escape from persons seeking to return him to slavery could not be construed as rioting or rescuing a prisoner from an officer of the law as had been set forth in the requisition papers from the Michigan authorities and certainly could not be applied to Thornton Blackburn's wife who, as the evidence showed, had taken no part at all in the rescue.

The council[14] was thereafter called upon to consider the question whether, if a similar charge had been committed in Canada, the offenders would be liable to undergo any of the punishments provided for in the act passed at the session of the Canadian Legislature in 1833. The Attorney General[15] was of the opinion that had the government been confined to the official requisition that had accompanied it, he might have been warranted in delivering up these persons inasmuch as there was evidence on which, according to the terms of the Canadian law, a magistrate would have been warranted in apprehending and committing for

[14] At the meeting were present His Excellency Sir John Colborne, K. C. B. Lieutenant Governor, the Hon. and Rev. John Strachan, D.D., Archdeacon of York, the Honorable Peter Robinson, the Honorable George Herchmer Markland, the Honorable Joseph Fells, and the Honorable John Elmsley. The Executive Council at that time was very much under the influence of the Chief Justice and Dr. Strachan, then Archdeacon afterwards the first Anglican Bishop of York or Toronto.

[15] Robert Sympson Jameson an English barrister of the Middle Temple, a familiar friend of Coleridge and Southey and the husband of Anna Jameson of some literary note.

The report is from the *Canadian Archives, State J.*, p. 137.

trial persons charged with riot, forcible rescue and assault and battery. The Attorney General believed, however, that the Governor and the Council were not confined to such evidence since, though limited in their authority to enforcing the provisions of the act against fugitives from foreign States, on being satisfied that the evidence would warrant the commitment for trial, yet in coming to that conclusion, they were bound to hear not ex parte evidence alone but matter explanatory to guide their judgment; for even with the authority so to do, they were not required to deliver up any prisoner so charged, if for any reason they deemed it inexpedient so to do.

The conclusion of the Attorney General, therefore, was that Blackburn and his wife were not charged with any of the offences enumerated in the statute of Canada and that the Governor and Council were not authorized by its provisions to send them out of the province. He said, moreover: "It has not escaped our attention as a peculiar feature in this case that two of the persons whom the Government of this Province is requested to deliver up are persons recognized by the Government of Michigan as slaves and that it appears upon these documents that if they should be delivered up they would by the laws of the United States be exposed to be forced into a state of slavery from which they had escaped two years ago when they fled from Kentucky to Detroit; that if they should be sent to Michigan and upon trial be convicted of the riot and punished they would after undergoing their punishment be subject to be taken by their masters and continued in a state of slavery for life, and that, on the other hand, if they should never be prosecuted, or if they should be tried and acquitted, this consequence would equally follow.

The next case was not so happy in its result. It caused much excitement at the time and is not yet forgotten. Solomon Mosely or Moseby, a Negro slave, came to the province across the Niagara River from Buffalo which he had reached after many days travel from Louisville, Ken-

tucky. His master followed him and charged him with the larceny of a horse which the slave took to assist him in his flight. That he had taken the horse there was no doubt and as little that after days of hard riding he had sold it. The Negro was arrested and placed in the Niagara Gaol. A prima facie case was made out and an order sent for his extradition.[16]

[16] The Executive Council on September 7th 1837 recommended his extradition. The following is a copy of the Proceedings:

EXECUTIVE COUNCIL CHAMBER AT TORONTO Thursday 7th September 1837

REQUISITION FOR SOLOMON MOSELY

Read the Requisition of the Governor of the State of Kentucky and other documents relating to the surrender of Solomon Mosely a fugitive from the State of Kentucky charged with Horse stealing.

Read also the Attorney General opinion thereon as follows:

ATTORNEY GENERAL'S OFFICE

TORONTO 6th September 1837

Sir,

I have the honor to report that in my opinion there is sufficient proof of the guilt of Solomon alias John Mosely a fugitive from the State of Kentucky charged with horse stealing in that Country—to Warrant His Excellency the Lieutenant Governor (with the advice of the Executive Council to deliver him up upon the request made by the Governor of the State referred to.

I have the honor to be &c

(Signed) CS HAGERMAN, *Atty, Gen*

J JOSEPH ESQ,

Civil Secretary.

The Council concur in the above opinion of the Attorney General and consider that the case comes within 3rd Wm 4 Ch 7 and therefore advise His Excellency the Lieutenant Governor to deliver up the Fugitive alluded to in the requisition of His Excellency the Governor of the State of Kentucky.

—*Can. Arch. State J. Upper Canada,* p. 595.

In a despatch from Head to Lord Glenelg, October 8, 1837, Can. Arch. 398, p. 149, Head says: "In a case brought before me only a few days previous to that which is the subject of this communication (*i.e.,* the Jesse Happy case) I insisted on giving up to the Governor of the Commonwealth of Kentucky (a slave) who in order to effect his escape had been guilty of stealing his Master's horse." It was suggested that the real object was to get him back to his Master—not to punish him for the crime. But the crime was perfectly proved and the Council followed the judicial opinion in the Thornton Blackburn case that as the black had been shown to have committed an offence clearly coming within the statute of 1833, they could not advise a course to be taken "different from that which should be pursued with respect to free white persons under the same circumstances." They, therefore, advised an order for extradition.

The people of color of the Niagara region made the Mosely case their own and determined to prevent his delivery up to the American authorities to be taken to the land of the free and the home of the brave, knowing that there for him to be brave meant torture and death, and that death alone could set him free. Under the leadership of Herbert Holmes, a yellow man[17] a teacher and preacher, they lay around the jail night and day to the number of from two to four hundred to prevent the prisoner's delivery up. At length the deputy sheriff with a military guard brought out the unfortunate man shackled to a wagon from the jail yard, to go to the ferry across the Niagara River. Holmes and a man of color named Green grabbed the lines. Deputy Sheriff McLeod gave the order to fire and charge. One soldier shot Holmes dead and another bayoneted Green, so that he died almost at once. Mosely, who was very athletic leaped from the wagon and made his escape. He went to Montreal and afterward to England, finally returning to Niagara, where he was joined by his wife, who also escaped from slavery.

An inquest was held on the bodies of Holmes and Green. The jury found "justifiable homicide" in the case of Holmes. "Whether justifiable or unjustifiable" there was not sufficient evidence before the jury to decide in the case of Green. The verdict in the case of Holmes was the only possible verdict on the admitted facts. Holmes was forcibly resisting an officer of the law in executing a legal order of the proper authority. In the case of Green the doubt arose from the uncertainty whether he was bayoneted while resisting the officer or after Mosely had made his escape. The evidence was conflicting and the fact has never been made quite clear. No proceedings were taken against the deputy sheriff; but a score or more of the people of color were arrested and placed in prison for a

[17] To his people he seems to have been known as "Hubbard Holmes" he is always called a "yellow man," whether mulatto, quadroon, octoroon or other does not appear.

time. The troublous times of the Mackenzie Rebellion came on and the men of color were released, many of them joining a Negro militia company which took part in protecting the border.

The affair attracted much attention in the province and opinions differed. While there were exceptions on both sides, it may fairly be said that the conservative and government element reprobated the conduct of the blacks in the strongest terms, being as little fond of mob law as of slavery, and that the radicals including the followers of Mackenzie, looked upon Holmes and Green as martyrs in the cause of liberty. That Holmes and Green and their followers violated the law there is no doubt; but so did Oliver Cromwell, George Washington and John Brown. Every one must decide for himself whether the occasion justified in the courts of Heaven an act which must needs be condemned in the courts of earth.[18]

It was, however, only when the alleged crime was recent and followed up promptly that the rigid rule of extraditing slaves accused of crime was applied. A case which came before the Executive Council a few days after Mosely's is a good illustration of the care taken in such cases. Jesse Happy, a slave in Kentucky, had made his escape to Canada, stealing a horse with which he outran his pursuers. Knowing the indisposition of the Canadian authorities to return fugitives from slavery, the Governor of Kentucky undertook to have this fugitive extradited on the ground that he was charged with a felony in that commonwealth. It appeared that the real object of the application from Kentucky was not so much to bring Happy to trial for the alleged felony as to reduce him again to a state of slavery. In the report of the Attorney General reference was made to an application for extradition in a case in

[18] The contemporary accounts of this transaction, *e.g.*, in the *Christian Guardian* of Toronto, and the *Niagara Chronicle*, are not wholly consistent. The main facts are clear; although there is some doubt as to the time, the military guard were ordered to fire.

which the offence had been recently committed, and because of this fact the requisition was honored. In the case of Jesse Happy, however, the alleged offence had been committed four years prior to making an effort to have him extradited. No process had been issued in the State of Kentucky nor had any steps been taken to punish him for felony. It was suggested, therefore, that the real object of this apprehension was to give him up to his former owners and to deprive him of the personal liberty secured to him by the laws of Canada.

As the delivery of the slave under these circumstances would subject him to a double penalty, the one of being punished for the crime and the other of being returned to a state of slavery even if he should be acquitted, the Canadian authorities were in a dilemma; for punishment of the felony was in strict accordance with the statutes of Canada whereas the enslavement of the fugitive was in direct opposition to the genius of its institutions and the spirit of its laws. Yet as the council[19] could not take the position that because a man happened to be a fugitive slave he should escape the consequences of crime committed in a foreign country to which a free man would be amenable, action was suspended so as to give the accused time to furnish affidavits of the facts set forth in the petition on his behalf, and not wishing to make of this a precedent without the support of the highest authority, the matter was submitted to the Government in England with a request for their views upon this case as a matter of general policy.[20]

Lord Palmerston having had the matter brought to his attention by Lord Glenelg, Secretary of State for War and the Colonies, recognized its very great importance. He accordingly had it submitted to the Law Officers of the Crown.

[19] Present, Allen, Hon. Augustus Baldwin and Hon. William Henry Draper (afterwards Chief Justice of the Court of Common Pleas, 1856, Chief Justice of the Province of Upper Canada, 1863, and President of the Court of Error and Appeal 1868 till his death, 1877).

[20] *Canadian Archives State J.*, p. 597.

The opinion of these officers Sir John Campbell and Sir Robert Mousey Rolfe appears from a letter from W. T. H. Fox Strangeways, Parliamentary Secretary of State for Foreign Affairs addressed February 25, 1838, to Sir George Gray of the Colonial Department. This officer said:

"I have received and laid before Viscount Palmerston your Letter to me of the 6 December 1837 with its accompanying copy of a Dispatch from Sir Francis Head, in which that officer requests Instructions for his guidance, in the general case of Fugitive Slaves who, having escaped to Canada may be demanded from the Canadian Authorities by the Authorities of the United States on the plea of their having committed crimes is the last mentioned Country and in the particular case of Jesse Happy, who having escaped to Upper Canada more than four years ago, had been demanded from the Lieut. Governor of that Province, upon the ground of a charge of Horse Stealing.

"These two questions have by direction of Lord Palmerston been submitted to the Law Officers of the Crown, and I am directed by his Lordship to state to you the opinion of these officers for the information of Lord Glenelg.

"The Law Officers report upon the general question, that they think that no distinction should in the case contemplated, be made between the demand for Slaves or for Freemen.

"It is the opinion of the Law Officers that in every case in which there is such Evidence of criminality as, according to the terms of the Canadian Statutes, would warrant the apprehension of the accused Party, if the alleged offence had been committed in Canada, then on the requisition of the Governor of the Foreign State, the accused Party ought to be delivered up, without reference to the question as to whether he is or is not a Slave.

"The Law Officers desire however that it should be dis-

tinctly understood, that the Evidence for this Purpose must be evidence taken in Canada, upon which (if false) the Parties making it may be indicted for Perjury.

"The Law Officers remark further on this point that the 3rd Section of the Provincial Statute enables the Governor to refuse to deliver up a Party, whenever special circumstances may render it inexpedient to accede to the demand made to the Governor on such a point.

"The Law Officers, reporting upon the subject of Jesse Happy state that they do not think that there was in that case such evidence of criminality, as, according to the Laws of the Province of Upper Canada would warrant the apprehension of Jesse Happy if the offence charged had been committed in U. Canada.

"The Law Officers indeed go farther, and say that so far as there is any evidence of the Facts, what took place was not Horse Stealing according to the Laws of Upper Canada, but merely an unauthorized use of a horse, without any intention of appropriating it.

"The Law Officers conclude by, stating, that upon these grounds, they are of opinion, that Jesse Happy ought to be set at liberty, and that instructions to that effect should be sent to the Lieutenant Governor of Upper Canada."[21]

On the ninth of May Glenelg wrote to Sir George Arthur who succeeded Bond Head as Lieutenant Governor of Upper Canada, saying: "With reference to my Dispatch to Sir Francis Bond Head of the 4th December last No 255, I enclose for your information the copy of a letter from the Under Secretary of State for Foreign Affairs stating the substance of the opinion given by the Law Officers of the Crown in respect to the restitution of Fugitive Slaves who may be demanded from the Government of Upper Canada

[21] *Canadian Archives*, G. 84, p. 277. The letter to Sir George Arthur is *ibid.*, G. 84, p. 275. The despatch from Lord Glenelg to Sir Francis Bond Head dated January 4, 1837, has endorsed on it a pencil memorandum "Jesse Happy has been liberated by Lieutenant Governor's command November 14, 1837," *ibid.*, G. 83, p. 238.

on the plea of their having committed crimes at the places from which they have fled. In conformity with the opinion of the Law Officers of the Crown I have to desire that Jessie Happy, the individual with respect to whom this question was raised shall be forthwith set at liberty."

It is impossible not to see that the very stringent rules laid down by the Law Officers of the Crown at Westminster were intended to be in *favorem libertatis.* Happy was released November 14th, 1837, and so far as appears from the official records no further application was ever made for the extradition of a runaway slave until after 1842. That year the well-known Ashburton Treaty was concluded[22] between Britain and the United States. This by Article X provides that "the United States and Her Britannic Majesty shall, upon mutual requisitions . . . deliver up to justice all persons . . . charged with murder, or assault with intent to commit murder, or piracy or arson or robbery or forgery or the utterance of forged paper. . . ." Power was given to judges and other magistrates to issue warrants of arrest, to hear evidence and if "the evidence be deemed sufficient . . . it shall be the duty of the . . . judge or magistrate to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive."

It will be seen that this treaty made two important changes so far as the United States was concerned. It made it the duty of the executive to order extradition in a proper case and took away the discretion. It gave the courts jurisdiction to determine whether a case was made out for extradition.[23] These changes made it more difficult

[22] Concluded at Washington, August 9, 1842.

[23] It was held in the Province of Upper Canada that the Act of 1833 was superseded by the Ashburton Treaty in respect to the United States, but that it remained in force with respect to other countries (Reg. *v.* Tubber, 1854, 1, P. R. 98). Since the treaty our government has refused to extradite where the offence charged is not included in the treaty. In re Laverne Beebe (1863), 3 P. R. 273—a case of burglary. The provisions of the treaty were brought into full effect in Canada (Upper and Lower) by the Canadian Statute of 1849, 12, Vic. c. 19; C. S. C. (1859), c. 89.

in many instances for a refugee to escape; but the courts were astute as ever in finding reasons against the return of slaves.

The case of John Anderson is a well-known one in evidence. He was born a slave in Missouri. As his master was Moses Burton, he was known as Jack Burton. He married a slave woman in Howard County, the property of one Brown. In 1853, Burton sold him to one McDonald living some thirty miles away and his new master took him to his plantation. In September 1853 he was seen near the farm of Brown, when apparently he was visiting his wife. A neighbor, Seneca T. P. Diggs, became suspicious of him and questioned him. As his answers were not satisfactory he ordered his four Negro slaves to seize him, according to the law in the State of Missouri. The Negro fled, pursued by Diggs and his slaves. In his attempt to escape the fugitive stabbed Diggs in the breast and Diggs died in a few hours. Effecting his escape to this province, he was in 1860 apprehended in Brant County, where he had been living under the name of John Anderson, and three local justices of the peace committed him under the Ashburton Treaty. A writ of habeas corpus was granted by the Court of Queen's Bench at Toronto, under which the prisoner was brought before the Court of Michaelmas Term of 1860.

The motion was heard by the full court.[24] Much of the argument was on the facts and on the law apart from the form of the papers, but that was hopeless from the beginning. The law and the facts were too clear, although Mr. Justice McLean thought the evidence defective. The case turned on the form of the information and warrant, a somewhat technical and refined point. The Chief Justice Sir John Beverley Robinson, and Mr. Justice Burns agreed that the warrant was not strictly correct, but that it could be amended. Mr. Justice McLean thought it could not and should not be amended.

[24] The Chief Justice Sir John Beverley Robinson, Mr. Justice McLean (afterwards Chief Justice of Upper Canada) and Mr. Justice Burns.

The case attracted great attention throughout the province, especially among the Negro population. On the day on which judgment was to be delivered, a large number of people of color with some whites assembled in front of Osgoode Hall.[25] While the adverse decision was announced, there were some mutterings of violence but the counsel for the prisoner[26] addressed them seriously and impressively, reminding them "It is the law and we must obey it." The melancholy gathering melted away one by one in sadness and despair.

Anderson was recommitted to the Brantford Jail.[27] The case came to the knowledge of many in England. It was taken up by the British and Foreign Anti-Slavery Society and many persons of more or less note. An application was made to the Court of Queen's Bench of England for a writ of habeas corpus, notwithstanding the Upper Canadian decision, and while Anderson was in jail at Toronto, the court after anxious deliberation granted the writ[28] but it became unnecessary owing to further proceedings in Upper Canada.

[25] The seat of the Superior Courts in Toronto, the Palais de Justice of the Province.

[26] Mr. Samuel B. Freeman Q. C., of Hamilton, a man of much natural eloquence, considerable knowledge of law and more of human nature; he was always ready and willing to take up the cause of one unjustly accused and was singularly successful in his defences. I have heard it said that it was Mr. M. C. Cameron, Q. C., who so addressed the gathering but he does not seem to have been concerned in the case in the Queen's Bench.

[27] The case is reported in (1860) 20 U. Can. Q. B., pp. 124–123. The warrant is given at pp. 192, 193.

[28] The case is reported in (1861) 3 Ellis & Ellis Reports, Queen's Bench, p. 487; 30, Law Jour., Q. B., p. 129; 7 Jurist N. S., p. 122; 3 Law Times, N. S., p. 622; 9 Weekly Rep., p. 255.

It was owing to this decision that the statute was passed at Westminster (1862) 25, 26, Vic. c. 20, which by sec. 1 forbids the courts in England to issue a writ of habeas corpus into any British possession which has a court with the power to issue such writ. The Court was Lord Chief Justice Cockburn and Justices Crompton Hill and Blackburn, a very strong court. The Counsel for Anderson was the celebrated but ill-fated Edwin James. The writ was specially directed to the sheriff at Toronto, the sheriff at Brantford and the jail keeper at Brantford. Judgment was given January 15, 1861.

In those days the decision of any Court or of any judge in habeas corpus proceedings was not final. An applicant might go from judge to judge, court to court[29] and the last applied to might grant the relief refused by all those previously applied to. A writ of habeas corpus was taken out from the other Common Law Court in Upper Canada, the Court of Common Pleas. This was argued in Hilary Term, 1861, and the court unanimously decided that the warrant of commitment was bad and that the court could not remand the prisoner to have it amended.[30] The prisoner was discharged. No other attempts were made to extradite him or any other escaped slave; and Lincoln's Emancipation Proclamation put an end to any chance of such an attempt being ever repeated.[31]

[29] Common Law of course, not Chancery.

[30] The court was composed of Chief Justice William Henry Draper, C. B., Mr. Justice Richards, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of Queen's Bench and of the Supreme Court of Canada and Mr. Justice Hagarty, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of King's Bench, and of Ontario.

Mr. Freeman was assisted in this argument by Mr. M. C. Cameron, a lawyer of the highest standing professionally and otherwise, afterwards Justice of the Court of Queen's Bench and afterwards Counsel for the Crown on both arguments were Mr. Eccles, Q. C., a man of deservedly high reputation, and Robert Alexander Harrison, afterwards Chief Justice of the Court of Queen's Bench, an exceedingly learned and accurate lawyer.

The case in the Court of Common Pleas is reported in Vol. 11. Upper Can., C. P., pp. 1 sqq.

[31] Canadian Archives, Sundries U. C., 1807.

It would be unfair to the United States to say or suggest that all the flights for freedom were in the one direction. Very early trouble was experienced by Canadian owners of slaves from their running away to the United States. The following letter tells its own story. D. M. Erskine the British representative writing from New York, May 26, 1807, to Francis Gore, Lieutenant Governor of Upper Canada, says:

"I have the honour to acknowledge the receipt of your letter of the 24th ult enclosing a Memorial presented to you by the Proprietors of Slaves in the Western District of the Province of Upper Canada.

"I regret equally with yourself the Inconvenience which His Majesty's subjects in Upper Canada experience from the Desertion of their slaves into the Territory of the United States, and of Persons bound to them for a term of years, as also of his Majesty's soldiers and sailors; but I fear no Representation to the Government of the United States will at present avail in

checking the evils complained of, as I have frequently of late had occasion to apply to them for the Surrender of various Deserters under different circumstances and always without success.

"The answer that has been usually given, has been, 'That the Treaty between Great Britain & the United States which alone gave them the Power to surrender Deserters having expired, it was impossible for them to exercise such an authority without the Sanction of the Laws.'

"I will however forward to His Majesty's Minister for Foreign Affairs the Memorial above mentioned in the Hope that some arrangements may be entered into to obviate in future the great Losses which are therein described."

In the *Life and Adventures of Wilson Benson, written by himself* (Toronto, 1876), is found the following, pp. 34–36:

"In 1849 I shipped on the schooner Rose of Milton, Capt. Hamilton, cruising on Lakes Ontario and Erie. In one trip to the town of Erie, Pennsylvania, for a cargo of coal, while lying at the dock, a diminutive negro man, with a white beard, came on board the vessel, and inquiried of me if this was a British vessel. On being informed that it was, he desired to be secreted, stating that he was a runaway slave, and that his pursuers were on his track. I at once secreted him in a closet which served as a store-room for vegetables, &c., and as we were almost ready to set sail, I did not discover his presence to either Captain or crew until we were some distance out on the lake. When he appeared, Capt. Hamilton inquired of me where I had obtained 'that child,' and on being informed, expressed some anxiety, as we were liable to be captured had we been followed by a steamer. As it was, he merely looked up at the rigging, and exclaimed, 'Blow, breezes, blow!' The negro, who knew no other name than 'Sambo' we brought to Toronto. On one occasion, when I offered him some molasses, he shook his head and made grimaces expressive of disgust. He informed me that the slaves employed on the sugar plantations, when beaten by their masters, in order to obtain an indirect revenge, spat in the syrup, and committed other filthy things as an imaginary punishment upon the whites. I frequently saw Sambo in Toronto, and many times he expressed thankfulness to me for his deliverance. I may here mention that shortly after the arrival of Sambo on board the Rose of Milton at Erie, two suspicious-looking men, dressed in plain clothes, came aboard and paced up and down the deck several times, and as all the crew were absent at the time, I felt some apprehenson for the safety of the poor fugitive; but seeing nothing of a suspicious appearance, and the almost entire absence of the crew, they sauntered away. I made several other trips up and down the lakes during that summer on the same vessel."